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THE NEW FRENCH LAW OF UNJUSTIFIED ENRICHMENT

ERIC DESCHEEMAEKER*

This paper explores the recent reform of the French law of unjustified enrichment that was effected through a government decree in 2016. It analyses the provisions of both "circles" of enrichment law – recovery of undue payment and unjustified enrichment strictly so called – in their historical and comparative context, both in terms of the conditions of liability and the measure of restitutionary liability.

A. INTRODUCTION

The French law of unjustified enrichment was recently reformed by the Ordonnance (government decree) of 10 February 2016 "pertaining to the reform of the law of contracts, the general regime of obligations and proof of obligations".[1] Common lawyers might be forgiven for not having paid close attention: it is not clear that their French colleagues have. Not only is contract law the one part of the Reform which the legal community really has been interested in; unjustified enrichment does not even appear, from its title, to be covered by it. This reflects, sadly but fairly, on the state of legal scholarship in a country where not a single academic would describe his main field of expertise as the law of unjustified enrichment (or the law of quasi-contracts, of which enrichment is typically regarded as a component part). Existing literature on the question, even concerning the pre-2016 law, is limited and generally unambitious. Historical or comparative efforts to contextualise it are virtually non-existent, making the newcomer's task especially difficult.

The Reform was primarily meant as a restatement of the law for purposes of intelligibility and accessibility by domestic and foreign lawyers alike.[2] Indeed it is probably because of the judge-made nature of so much of the existing law, including of course the general action for *enrichissement sans cause*, that enrichment – and generally quasi-contract – was brought within the fold of the project. Yet the Ordonnance did not shy away from changes when thought necessary, the most noticeable (albeit not significant in itself) being the rebranding of the general enrichment claim, from *enrichissement sans cause* ("enrichment without legal ground" or "basis") to *enrichissement injustifié* ("unjustified enrichment"). Whether it innovates or retains the existing law, the most recent iteration of French law is at any rate the latest link in an uninterrupted tradition harking back to Roman law and can only be understood against this background. This is what this paper endeavours to do: expound but also contextualise, historically and comparatively, the "new" French law of unjustified enrichment. It is a first and provisional effort in a field facing a dearth of analytical scholarship; if it spurs other scholars, in France and elsewhere, to take the analysis further, it will have achieved its aim.

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[1] Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, *Journal Officiel de la République Française*, 11 February 2016, No. 26. An English translation by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker (which this paper relies on) is available on the French Ministry of Justice's website.

[2] The genesis of the Reform would deserve separate treatment, as would its relationship with Quebec law, which also codified judge-made developments (themselves inspired by French law) in 1994. The two academic projects on which the eventual text drew most heavily were, first, that led by Pierre Catala, with Gérard Cornu responsible for the sections on quasi-contracts (P Catala, *Avant-projet de réforme du droit des obligations et de la prescription* (La documentation française, Paris, 2006), 75); second, the Terré project where Philippe Remy, possibly the best French scholar on those issues, was responsible for the section on "other sources of obligations": F Terré (ed), *Pour une réforme du régime général des obligations* (Dalloz, Paris, 2013), 31.

The paper is divided in five parts: after some preliminary remarks to set the scene for the enquiry, it will examine the conditions of liability concerning the twin doctrines of recovery of undue payment and unjustified enrichment *stricto sensu*, before mapping French law onto the Wilburg/von Caemmerer taxonomy (which has long played a structuring role in comparative scholarship) and, finally, turning its attention to the measure of recovery in unjustified enrichment claims.

B. THREE PRELIMINARY REMARKS

1. Scope of the doctrine(s)

A paper on "the French law of unjustified enrichment" naturally calls for a definition of its subject matter: what does this phrase refer to? The answer, however, turns out to be more complicated than one might have expected in a codified system.

There exists, in French law, a well-identified body of law which was known until 2016 as "enrichment without ground" and is to be known, after the Reform, as "unjustified enrichment". It is naturally tempting to rely on terminological similarities and identify it as the *mos gallicus* of what is known internationally as the law of unjust or unjustified enrichment; yet this would be highly inadequate. It is not simply that individual bodies of rules which recognisably occupy the same place on the "map" of the law have different boundaries in different legal systems: this would simply be an inevitable complication to be mindful of. The problem is more fundamental and lies in the fact that what an English or German lawyer would regard as the heart of their law of unjust(ified) enrichment is found in France – as indeed in most of the Latin branch of the Romanist tradition – not within *enrichissement injustifié* but as part of a separate doctrine of "undue payment" (*paiement de l'indu*), which has formed part of the Civil Code since its origins and remains a distinct source of obligations after the Reform.

Contrary to what is often suggested in comparative scholarship, there has therefore long existed a law – even a codified law – of unjustified enrichment in France, namely, the body of rules pertaining to recovery – *répétition* in the old parlance, *restitution* in the new one – of at least certain types of benefits transferred between the parties with a view to performing an obligation that did not in fact exist (a principal subset of what English law calls "enrichment by transfer" and German law refers to as the *Leistungskondiktion*). Limited though its scope might be, compared with the general principles that characterise English or German law today, it dealt with cases of unjustified enrichments long before the celebrated *Boudier* case of 1892 and the judge-made developments that followed.[3] What is known as the law of *enrichissement sans cause* or *injustifié* was only ever meant to extend the scope of liability to areas not covered by what might be described as the "inner circle" of enrichment law,[4] namely, indirect enrichments, undue payments of services (reintegrated within the recovery of undue payments as part of the Reform) and transfers not carried out *solvendi causa*. It is best thought of as a second concentric circle. It would make no sense to examine the outer layer in isolation from the core it surrounds. Unjustified enrichment in French law is not, not even primarily, the doctrine of *enrichissement injustifié*.

But, once the semantic link has been broken, it is not clear how far one should then extend the scope of one's enquiry. The problem is especially acute here because unjustified enrichment as a doctrine or idea, is particularly open-textured. It can plausibly be regarded as underpinning vast swathes of the law; indeed it has been suggested that the entirety of private law was reducible to it. Even if this is excessive, how far should one go? There is no ready-made answer to this question;

[3] Cass. Req., 15 June 1892, *Patureau-Miran v Boudier*, DP 1892.1.596; S. 1893.1.281; *post* Part D(1)(b).

[4] Even the word "extending" is problematic. That *paiement de l'indu* can be regarded as grounded in the prohibition of unjustified enrichment is not controversial. Yet it follows rules which are, at least in part, different which, in turn, suggests that the two doctrines are not founded upon exactly the same principles. As the law stands, *paiement de l'indu* could not be abolished as a mere *species* of a wider *genus*; it retains an irreducible distinctiveness.

given the purposes of this paper, we can safely restrict ourselves to the above two doctrines (recovery of undue payment and unjustified enrichment narrowly so called), limited references being made when necessary to other doctrines of private law which are uncontroversially recognized as giving effect, in specific contexts, to the principle against unjustified enrichment: for instance the rules concerning *negotiorum gestio* (Arts 1301ff. CC) or various doctrines dealing with what English lawyers would describe as imposed enrichments, such as the *théorie des impenses*. Additionally, because the rules on undue payment now cross-reference to a new chapter on "restitutions" ("*les restitutions*", Arts 1352 – 1352-9 CC), which deals with a variety of instances of "giving back", in particular restitutions under failed contracts – but not, remarkably, the restitution of unjustified enrichment – these provisions must be included as well.

2. Unjustified enrichment within the Civil Code

Enrichissement injustifié, narrowly so called, is now to be found as one of three nominate quasi-contracts regulated in the Code. Restitution of undue payment is another, *negotiorum gestio* being the third. The codification of the *actio de in rem verso* – another name under which the general enrichment action was and, presumably, will continue to be known – under this heading is unsurprising insofar as (i) this is already where its uncodified predecessor, *enrichissement sans cause*, was held by scholars to belong, and (ii) the quasi-contractual category had increasingly come to be accepted as the reverse side of unjustified enrichment, broadly construed as a third pillar of obligations besides contract and non-contractual liability. It is nonetheless unsatisfactory considering the intrinsic corruption of the concept of quasi-contract, all the more so given that *enrichissement injustifié* is not *quasi* an identifiable contract in the same way *negotiorum gestio* can be regarded as *quasi* a mandate or undue payment *quasi* a loan: a transaction giving rise to the same obligations as if it had been consented to despite not having been.

3. From "enrichment without ground" to "unjustified enrichment"

The most noticeable change brought about by the Reform might be the relabelling of the category formerly known as "enrichment without ground" (or "cause"), henceforth to be known as "unjustified enrichment"; yet it is perhaps the least significant. No substantive change was intended to follow and none is likely to ensue. The concern was simply to remove the concept of *cause* altogether from the Code after it had been – controversially – discarded in the context of contract law,[5] even though it had long been clear that *cause* did not mean the same thing in the context of enrichment (where it designates the legal ground on which the enrichment can be retained) and contract (where it refers to the reason for the debtor's obligation: *cur debetur?*).

C. ENRICHMENT *SOLVENDI CAUSA*: RESTITUTION OF UNDUE PAYMENT

1. The concept of "undue payment"

(a) Introduction

The inner circle of the French law of unjustified enrichment concerns the recovery (*répétition*, *restitution*) of "undue payments", dealt with in Arts 1302 to 1302-3 of the Civil Code. Immediately we are confronted with a terminological difficulty. In this context *paiement* is used to refer to the performance (execution, fulfilment, discharge, satisfaction) of any obligation, whether monetary

[5] Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, *Journal Officiel de la République Française*, 11 February 2016, No. 25.

or not.[6] Yet only an existing obligation can be paid: if the (would-be) payment was undue, by construction there was no bond to discharge. Accordingly, common though the phrase might be, "payment of the undue" is a contradiction in terms. Whatever the provision of the benefit amounts to in legal terms, it is not a *paiement*.[7] French writers are content to accept this but hardly ever ask the next question, namely: if the action for recovery of undue payments is not about the recovery of undue "payments", then *what* is it about?

The key to the answer is that the only difference between the (false) payment of an *indebitum* and the (real) payment of the corresponding *debitum* is that the object of the performance was not owed to the other party by the claimant. But the act is the same – the transfer of a benefit to the defendant; and so is its purpose – the untying of a bond through performance of the obligation. Accordingly, what characterises the payment of the undue is that it was done *solvendi causa* – "for the purpose of solving" – but failed to achieve its purpose because there was nothing to "dissolve". This is what the doctrine of "recovery of undue payments", properly understood, deals with. Even though the misleading label is in danger of concealing it, a conferral of a benefit to the defendant that was not done with that particular purpose in mind is not – or at least should not be – a *paiement* for the purposes of Arts 1302ff. CC.

(b) Undue payment and the Roman condictiones

Save for a brief allusion, the above was set out without reference to history; yet, as even this brief allusion to the *condictio indebiti* and Pothier hinted, it is difficult to understand the modern state of French unjustified enrichment law without understanding how it came into existence, which in turn entails returning to the Roman system of *condictiones* – personal actions that were designed to reverse transfers of ownership in situations where the defendant, even though he had acquired title,[8] was regarded as having a duty to restore the thing received to the claimant because its retention would be "without basis" (*retinere sine causa*).[9]

Chief among them was the *condictio indebiti*, which was available when a sum of money, or other thing (*res*), had been transferred in order to discharge an obligation that did not in fact exist. That French *paiement de l'indu* is heir to the Roman *condictio indebiti* can hardly be doubted; if proof was needed, it is the only way to explain why, until the Reform, the *paiement* contemplated had to be (like under the classical *condictio indebiti*, but contrary to the normal scope of *paiement*) either *certa res* or *certa pecunia*: a determined thing or sum of money – including an ascertained quantity of a fungible thing (*certa quantitas*) but excluding the performance of a service. It is only in 2016 that the historical link was severed and the action for undue payment became available, as logic would dictate, for the restitution of the value of a service performed without being owed.

What complicates things, however, is that – quite apart from this recent extension – the French action has always been broader than its Roman ancestor. In particular, at least that section of the *condictio furtiva* which relied on performance on the claimant's part (which the defendant would have known to be undue to him, hence his being held as a thief)[10] was subsumed under *répétition de l'indu*. While, contrary to Roman law, bad-faith receipt does not prevent title from passing in French law, and does not make the recipient a thief, this conflation of actions has had

[6] However, for historical reasons due to the ghost image of the *condictio indebiti* as it existed in classical Roman law and was made his own by Pothier, the doctrine of undue payment traditionally excluded the provision of services. A principal change brought about by the 2016 reform was (following a proposal made by Philippe Remy in the Terré project) to bring it within its scope.

[7] This is the reason why the term *reçu* (received) was substituted for *payé* (paid) in Art 1302 CC. On its face this would seem to broaden the scope of the doctrine to all transfers, regardless of their purpose. But it is clear that this was not intended; indeed the traditional name – hence scope – of the doctrine was retained in the relevant heading.

[8] The *condictio furtiva* was an exception but it is universally regarded as abnormal (and already was by Gaius); we should not take it into account when considering "condictions" as a whole.

[9] For an overview, see R Zimmermann, *The Law of Obligations* (Clarendon Press, Oxford, 1996), 854ff.

[10] Ibid, 849.

one notable consequence: that of giving rise to two different measures of recovery – one for good-faith recipients, heir to the *condictio indebiti* and more protective of the defendant; the other for bad-faith recipients, heir to the *condictio furtiva* and, unsurprisingly, much less protective.[11] In that sense, French *paiement de l'indu* really rolls up the two actions into one.

What about the other *condictiones*? The action that came to be known as the *condictio ob causam finitam*, which concerned transfers that were owed at the time but later became undue with retroactive effect (for instance the payment of money damages pursuant to a judgement that was subsequently reformed), would also straightforwardly come under the modern doctrine of *paiement de l'indu*: it makes no difference whether the obligation did or did not exist in the first place, as long as performance has become undue by the time the claim is brought.[12] The *condictio causa data causa non secuta*, concerning transfers made for a purpose which failed to materialise, would be dealt with as part of the general enrichment action. The *condictio ob iniustam causam* (dealing with the return of donations between husband and wife, which were void in Roman law) has no application in French law; and the *condictio ob turpem causam* (concerning agreements with an immoral purpose) would be dealt with as part of the law of contracts.[13]

(c) "Condicting" and vindicating benefits

It is therefore not true that, as is regularly claimed, French law did away with the Roman *condictiones* – which in turn is supposed to explain why, contrary to German law (which built its law of unjustified enrichment on a generalized *Kondiktionensystem*), it had to resort to an altogether different legal basis, the *actio de in rem verso*, to that effect. What is true, however, is that rules pertaining to the transfer of ownership that came to prevail in modern French law have extended – albeit to an extent which is far from clear – the scope of property law at the expense of the law of obligations, including the law of unjustified enrichment.[14]

As is well known, modern French law considers that contracts said to be "translative of property" (*contrats translatifs de propriété*, of which sale is the paradigmatic example) operate the transfer of ownership by the sole agreement of the parties (*solo consensu*).[15] To put the same point differently, the obligation to transfer ownership of the thing is executed instantly and by operation of the law the moment the contract is complete, without the need for any further action, in particular delivery (*traditio*), on the part of the parties.[16] One principal consequence is that the retroactive avoidance of the contract, whether through nullity (*nullité*), termination (*rescision*) or lapse (*caducité*, a new doctrine introduced by the Ordonnance), immediately transfers ownership back to the transferor. Title being regarded as having never passed the claimant can, at least prima facie, bring the *rei vindicatio* to claim the thing back. This is a major difference between French law on the one hand and Roman or German law on the other.

However it is important not to overstate this doctrine of transfer of ownership *solo consensu*. We know it applies to a specific type of transactions and in respect of benefits which are capable of being vindicated, i.e. immovables (*immeubles*) and ascertained movable property (*corps certains*),

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[11] See *post* Part F(2)(b).

[12] However restitutions after avoidance of contract have always been regarded as a law unto themselves, not – or at least not necessarily – grounded in the recovery of undue payments: see *post* n 40.

[13] Here the contract would be void for immoral *cause* – now lack of "lawful content": Art. 1128 CC – and the law may or may not permit recovery of benefits transferred based on underlying policy reasons.

[14] Consonant with the rest of the civilian tradition, unjustified enrichment is regarded as a source of obligations only in French law: no property right can arise from the receipt of a reversible enrichment. On the other hand, the primacy of restitution in kind (*post* Part F(1)(b)) means that the obligation imposed on the defendant will often be to re-transfer ownership of a specific asset.

[15] Art. 1196 (formerly 1138) CC; see also Art. 938 CC for gifts (*donation*) and Art. 1583 CC for sale.

[16] This development is frequently attributed to Domat but this is mistaken. His *Loix civiles*, §1.1.2.2.10, clearly adhere to the traditional view that, in the contract of sale, ownership is transferred upon delivery (*traditio*). That view was also firmly held by Pothier. Rather it seems that the source is to be found in d'Aguesseau's 15th *plaidoyer* (1692).

but – ordinarily – not money and unascertained movable property (*choses de genre*), in respect of which ownership would have passed upon mixing. Outside of these scenarios, the situation is much less clear. In particular, in the case of undue payments which do not arise from the retroactive avoidance of a *contrat translatif de propriété*, there is often uncertainty surrounding the question whether ownership has passed in the first place, hence whether the thing should be vindicated rather than "condicted".

To take an example which would clearly fall under the claim for restitution of undue payment, A transfers a *res certa* to B in the mistaken belief that he owed it to him. Has B acquired ownership? Remarkably the position is not settled in French law. Pothier's view was that it had: "He who pays by mistake something which he believes he owes to another intends to transfer dominion by delivering it; similarly he who is paid intends to become owner: such agreement of their wills suffices, along with delivery, to convey ownership".[17] One would look in vain for such an explicit principle in post-1804 French law, whether in the Code, case law or treatises on the law of property: delivery *solvendi causa* is not one of the recognised modes of acquisition of ownership when no obligation to give actually exists. Yet the transfer seems to be implicit in the fact that the action for *paiement de l'indu* is a personal, not real, action, which only makes sense if ownership has in fact passed. This view is endorsed, if only tacitly, by most scholars.

There is however another view, which was put forward by Toullier: given that the claimant is mistaken, there was no valid consent to give and receive underpinning the delivery, hence no passing of ownership.[18] Having remained owner the claimant can (and, presumably, should) vindicate it. This view still has supporters today;[19] but, while it would seem to be the better one on first principles, it is difficult to understand why a thing capable of being vindicated could be claimed under the codal provisions pertaining to undue payment, which as was said assume that ownership has passed.[20] Yet this is something that courts have clearly always allowed. This discrepancy, unnoticed by scholars, is troubling.

It might be that the answer is that it would be a false dichotomy to assume that either ownership has passed and the action to be brought must be a *condictio*, or it has not and it should be a *rei vindicatio*. It is not logically impossible for a legal system to allow an owner to bring a *condictio*: in such a case, we would need to accept that, at some point in the legal process, he implicitly relinquishes ownership – which at that point is acquired by the other party, if only through *occupatio* of what would now be a *res nullius* – turning his claim into one for the re-transfer of ownership. As Lionel Smith has observed, this was the case with the *condictio furtiva* and is also the (mostly implicit) principle underpinning the English tort of conversion.[21] It would make sense of the above discrepancy if we accepted that the same principle is at work in modern French law – but, if it is, legal scholars have been remarkably silent about it.[22]

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[17] RJ Pothier, "Du quasi-contrat appelé *promutuum*, et de l'action *condictio indebiti*", in *Œuvres complètes* (new ed., Thomine & Fortic, Paris, 1821), vol 8, 252.

[18] CBM Toullier, *Le droit civil français suivant l'ordre du Code* (6th ed. by JB Duvergier, Cotillon & Renouard, Paris, 1843), vol 6, §58.

[19] E.g. H, L and J Mazeaud, *Leçons de droit civil* (9th ed. by F Chabas, Montchrestien, Paris, 1998), 799 (who puzzlingly argue that the claimant has a proprietary action against remote recipients but a personal action in recovery of undue payment against the immediate one).

[20] Naturally there are other principles on which ownership could have passed, but it is not apparent which one(s) would account for the transfer in such a case. In particular, it must be remembered that the doctrine according to which "in the case of movable property, possession is equivalent to title" (Art. 2276 [formerly 2279] CC) does not apply to the relationship between transferor and transferee.

[21] L Smith, "Property, Subsidiarity and Unjust Enrichment", in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP, Cambridge, 2002), 588, 589-92.

[22] A related difficulty (and possible explanation) is that much terminological uncertainty shrouds the issue. In particular, scholars and courts tend to focus not on the nature, *in personam* or *in rem*, of the action but on its content, and speak of an *obligation de restitution*, i.e. a "duty to restore". This word, *restitution*, is as ambiguous in French as in English; it can equally refer to the physical surrendering of a thing that never left the claimant's estate or the re-transfer of ownership to its previous owner. Accordingly they have no difficulty describing the *rei vindicatio* as an *action en*

2. Conditions of liability: mistake, duress and fault

To summarize: the misnamed doctrine of undue payments concerns transfers – including, since 2016, the provision of services – done *solvendi causa* in situations where the obligation turned out not to exist, preventing the intended payment to become an actual payment. It does not matter why the duty did not exist: for instance it might have been carried out in furtherance of a contract which never came into existence or turned out to be invalid, or the obligation might have been a different one or have existed between different parties. In all cases the transfer is, as between the parties,[23] lacking a legal ground, i.e. a cause for the retention of the benefit.[24] This section explores the conditions of liability under the claim.

(a) Mistake (and duress)

Must the payment also have been mistaken, i.e. is it necessary that the claimant should have believed he was bound to pay the defendant? This question, which has long vexed Romanists, has also caused much ink to spill in modern French law.

To understand the question we must first distinguish between three types of *indebita*. When A transfers *x* to B in order to discharge his obligation to him, and *x* was not in fact owed by the former to the latter, there are three logical possibilities:

> (1) A was not the debtor of the obligation to pay *x* and neither was B its creditor. French law calls this an absolute (or objective) *indebitum* (*indu absolu*, *indu objectif*);
> (2) A owed *x* but to C_1 not B: this is the first case of relative (or subjective) *indebitum* (*indu relatif*, *indu subjectif*);
> (3) B was owed *x* but by C_2 not A: this is the reverse case of "relative *indebitum*" and corresponds to the payment of another's debt.

In all three cases French law gives an action to A against B for restitution of undue payment.[25]

The Code of 1804 only mentioned error in the context of the third scenario; it was silent concerning the first two. However, consonant with the dominant understanding of classical Roman law, of the *condictio indebiti* being, as Donellus and Pothier put it, a *condictio indebiti per errorem soluti* ("an action of debt relating to something undue paid by mistake"),[26] courts and scholars swiftly filled the silence of the Code and extended the requirement of error to all cases of *solutum indebitum*. It was never clear, however, if mistake – which encompassed mistakes of law as well as of fact – had to be proved by the claimant or could be presumed from the absence of the debt;

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restitution, just like the *paiement de l'indu* is an action in restitution: see e.g. C Guelfucci-Thibierge, *Nullité, restitutions et responsabilité* (LGDJ, Paris, 1992), 371, 401-2. This makes it exceedingly difficult to ascertain the nature, real or personal, of the claimant's action.

[23] It is irrelevant that the defendant's enrichment might be justified for the purposes of the law of unjustified enrichment. For instance, where the claimant paid the defendant in the mistaken belief that a third party's debt was his own, he can recover under undue payment even though (quite apart from issues of subsidiarity) a claim in unjustified enrichment would fail on the basis that the enrichment was justified by the third party's debt. What matters in undue payment is that the debt he *intended* to dissolve, i.e. his own, did not exist.

[24] It is true that the disputed transfer might have been carried out by the claimant for a purpose which provides a legal basis for its retention, for instance with liberal intent (*animus donandi*) or in order to settle a dispute between the parties. But, in such cases, by construction the transfer would not have been done *solvendi causa*. It might be a (justified) enrichment by transfer but it not a "due payment". Here we see the dangers of using a label which conceals the nature of the claim.

[25] In scenario (3), besides an action against B, the Code now also gives one against the real debtor, C_2: Art. 1302-2 al. 2 CC. (This was not part of the Code of 1804 and was recognised *para legem* by the Cour de Cassation in 2001.) This cannot possibly be a case of undue payment, since there was no payment from A to C_2, and has to be based on unjustified enrichment.

[26] For a summary of the debates concerning the requirement of error in the *condictio indebiti*, see Zimmermann (*supra* n 9), 849ff. It seems that error (or rather the lack thereof) would have gone to defences rather than the prima facie cause of action.

courts, especially after 1965, tended to move from the former to the latter. In 1993, however, the Court of Cassation changed its stance and removed the requirement of mistake in scenarios (1) and (2), retaining it only (as it was bound to by the clear codal provision) in the last one. It remained however open to the defendant to prove lack of error (i.e. that the claimant knew he was not obliged to pay) or – which is very largely the reverse side of the same idea – that the transfer really had a legal basis, such as a gratuitous intention.[27]

What failed to be observed in this debate, however, is that in all but one – perhaps abnormal – case, error is in fact consubstantial to claims for undue payment, if one that that can be presumed from the nature of the claim. The reason is that what the doctrine visits is, by definition, transfers carried out *solvendi causa*. If the transfer was effected in order to dissolve an obligation but the obligation did not exist at all (scenario (1)), the claimant *must* have been mistaken about its existence.[28] There is no other possibility; situations where the claimant intended the transfer as a liberality, or paid to avoid troubles, or under duress (not believing he was bound),[29] are not payments to start with: they are not transfers *solvendi causa* and do not come within the scope of the doctrine in the first place.

The same reasoning applies to scenario (2), where the claimant will also have been mistaken about the identity of the creditor.

Scenario (3) is indeed different. It captures two different situations, of which there is reason to believe that only one is properly an undue payment. *De deux choses l'une:* either A paid believing that C's debt was his own, or he knowingly paid C's debt. In the first case, he was by construction mistaken and we are back to the above scenarios. In the second one, he meant to pay another's debt, which, in French law, is in principle a perfectly valid juridical act. It seems that there are three reasons why this might have occurred:

> (i) A meant to claim reimbursement from C later, in which case he will be regarded as the manager of the latter's affairs and will have a claim under the *actio negotiorum gestorum contraria*; but no claim in undue payment because there was no mistake about the existence of the claim.
> (ii) A intended to gratify C, in which case again there will not be no action in undue payment because of the absence of mistake; given that the transfer has a cause (it was carried out *donandi causa*), it cannot be recovered in unjustified enrichment either.
> (iii) A was coerced into paying, for instance because he stood in a close relationship to the actual debtor: in that case, the Code now explicitly recognises – as courts long had – that he will be able to recover (in undue payment) despite the existence of the debt being paid and his absence of error.[30]

Only the first alternative can properly be described as an undue payment. The transfer was carried out to pay one's debt, which debt did not exist: the payment was therefore undue, and *for the same reason* it was mistaken. In all three branches of the second alternative, it was done in order to dissolve a debt which did in fact exist;[31] it is therefore not undue and, by the same token, it is not mistaken.[32] Error and undue payment, correctly defined, are inextricably the flipside one of the other.

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[27] As mentioned above, this amounts to showing that the transfer was not a payment in the first place, not that it is a "due payment".

[28] The same is true when the payment becomes retroactively undue because of the nullity of the act – contract, judgement, etc. – that originally gave (or appeared to give) rise to it: the claimant will have paid at the time under a mistaken belief in the existence of a valid obligation.

[29] On the other hand, paying under duress one's own debt to the rightful creditor is a proper payment since the contemplated obligation did in fact exist.

[30] Art. 1302-2 al. 1 CC. In order to protect the defendant, the claim disappears when, relying on the receipt, he cancelled his instrument of title or released a security.

[31] The relevant question is not whether the debt paid was owed by the claimant or another party but whether the bond that did in fact exist was the same as the one which the claimant intended to discharge.

[32] The argument is not that there should be no recovery, but that there should be no claim *in undue payment*. In scenario (i) the claimant – rightly – has an action for *negotiorum gestio* (excluding, through subsidiarity, any alternative claim in unjustified enrichment). In scenario (iii) too, the verdict of reversibility reached by the law is correct; but it is properly

(b) Fault

A question that has long plagued French law is the extent, if any, to which the claimant's fault is relevant to either the availability of the action or the scope of recovery. French law departs very significantly from either English or German law on this question, which deserves examination.

The post-Ordonnance position is that, in respect of both undue payment and unjustified enrichment, fault is a factor that goes to quantum of recovery. The court may reduce the "restitution" (Art 1302-3 CC) or "indemnification" (Art 1303-2 CC) of the claimant based on – i.e., presumably, in proportion of – his "fault". Prior to the Reform there was no statutory provision and case-law had been haphazard, meandering between barring the *fautif* claimant's action altogether, to disregarding it, to distinguishing on the basis of the degree of fault or the type of *indebitum*.[33] The latest iteration had been that fault was no bar in itself, but any loss caused to the defendant by the claimant's fault could be offset against the quantum of recovery.

Fault has never been defined in either context. As far as undue payments are concerned it seems to only ever mean one thing: having paid negligently, in the sense of not having taken due care to check the existence of the debt before paying the *accipiens*. It is not difficult to understand how a payment can be negligent in that sense but it is much less straightforward to understand what consequences this should have and why. It has always been the case that if the claimant's negligence had caused the defendant loss, that loss could be offset by the defendant. This is a simple case of rolling up two actions in one: one party's claim in undue payment and the other's (counter-)claim in civil liability. Yet what would "loss" mean in that context? Apart from the disappointment of finding out that one is not as rich as one had thought, it is not clear how the duty to return a benefit that one is by definition not entitled to retain could constitute a loss. Yet this is exactly what courts came, at least in some cases, to accept (without looking into events that occurred post-receipt).[34] This is rather perplexing.

In reality, the role of the claimant's fault is transparently to protect the security of the defendant's receipt in situations where it is thought that it would cause the defendant undue hardship to be obliged to return it. A prime example, around which much case-law has historically revolved, is social security payments made to individuals on low incomes who are later notified that they must return benefits to which, it turns out, they were not entitled. Here, courts have regularly construed the duty to return the benefit as "loss" for the purposes of Art. 1382 (now 1240) CC and, to further protect defendants, they also often presumed the *faute* from the very payment of the *indebitum*.[35]

The real issue here, which the rule is a poor attempt at mitigating, is that, when it comes to undue payments of money,[36] French law does not have a defence of good-faith change of position.[37] Under the restitutionary paradigm, what must be returned is prima facie what was received, i.e. in English terms the "enrichment received". There is no equivalent to the rule applying to immovables or ascertained movable property, that what must be returned by good-faith defendants is, in kind or value, whatever remains of the thing received. To put the same point

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a case of unjustified enrichment, where the existence of a legal ground to the defendant's enrichment, C's debt to B, is defeated by the "unjust factor" of duress.

[33] For details, see O Deshayes, T Genicon and YM Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations* (LexisNexis, Paris, 2016), 549; AM Romani, "La faute de l'appauvri dans l'enrichissement sans cause et dans la répétition de l'indu", D. 1983. Chr. 23; Guelfucci-Thibierge (*supra* n 22), 432ff. Because fault was seen by at least one strand of cases as going to the very availability of restitution, it is better treated in this section than under quantum of recovery.

[34] For details, see R Thunhart, "Le paiement de l'indu en droit comparé français, allemand, autrichien et suisse", 53 *Revue internationale de droit comparé* (2001) 183, 187ff.

[35] Ibid, 189.

[36] Or other fungibles – but in practice the bulk of cases concern monetary payments.

[37] For difficulties concerning the restitution of the value of services (now also coming under the provisions for recovery of undue payment when carried out *solvendi causa*), see *post* Part D(2)(c).

differently, it is irrebuttably presumed that when things become mixed into a fund, the enrichment persists at the time of litispendence. While it is not difficult to sympathise with the aim of the rule, it is clearly wrong. Not only is there no particular reason why the scope of recovery should depend on the claimant's state of mind, there is no logical connection (or even correlation) between how negligent the claimant was and how "disenriched" the defendant worthy of protection.

Prior to 2016 the law looked, at least in principle, to the *consequences* of the claimant's fault. Consonant with the logic of civil liability, what had to be taken into account was the loss caused to the defendant. The emphasis was shifted by the Reform to the negligence itself. This moves the rule away from the set-off model to one that is perhaps best described as what English lawyers would call a "balance of equities" between the parties: a remedy arguably worse than any affliction the previous state of affairs might have suffered from. Difficult though it might be to work out in practice, what is needed is the recognition of what the law has been groping for here through the doctrine of claimant's fault, namely, a defence of disenrichment for good-faith recipients of, in particular, money – the equivalent of that which avails in the case of other benefits unduly "paid" (or indeed under the general action for unjustified enrichment).[38]

D. UNJUSTIFIED ENRICHMENT IN OTHER WAYS

1. Introduction

(a) Generalities about the actio de in rem verso

We move from the inner to the outer circle of French enrichment law. Art 1303 CC, which put on a statutory footing the judge-made action traditionally referred to as the *actio de in rem verso* (even though it has little to do with the namesake Roman action), provides that:

> Apart from the situation of management of another's affairs and undue payment, a person who benefits from an unjustified enrichment to the detriment of another person must indemnify the person who is thereby made the poorer to an amount equal to the lesser of the two values of the enrichment and the impoverishment.

This can be described as the general action for unjustified enrichment in modern French law. As mentioned, a great paradox of French law is that the general action does not cover the core cases of enrichment liability, which are dealt with through a different doctrine answering to a logic which, albeit similar, is not identical. This exclusion is made explicit by the introductory clause of Art. 1303 CC, although the doctrine of subsidiarity[39] makes it redundant. Accordingly, even though such situations are prima facie covered by the words of the provision, the general action does not deal with transfers done *solvendi causa* (including, since 2016, the performance of undue services); on the other hand, even though it might be excluded in particular contexts by other doctrines, it does apply at least prima facie to indirect enrichments and to transfers carried out for other purposes than the "dissolving" of an obligation.[40]

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[38] *Post* Part F(3)(a). In German law the defence of disenrichment would apply because it is built into the *Leistungskondiktion* (itself conceived of as an enrichment action) through which such claims would be brought: §818 (3) BGB.

[39] On which see *post* Part D(2)(b).

[40] It is worth spelling out how narrow the scope of application of the general action has become. Besides its being ousted by all manner of other doctrines through the principle of subsidiarity, including its core area of – prima facie – application, four facts combine to explain this. First, property law is broader in French law than in many other legal systems (*ante* Part C(1)(c)). Second, there exists virtually no restitution for wrongs (*post* Part E(3)). Third, French law is in principle happy to justify the retention of a benefit by the defendant on the basis of a juridical act with a third party (*post* Part D(2)(b)), to the effect that the seminal *Boudier* case would no longer succeed today. Fourth, restitutions after avoidance of contract are regarded as forming a law unto themselves, at least for presentational purposes (they will be dealt with as part of the law of contracts rather than quasi-contracts) and, for most scholars at least,

The core requirements of the action are straightforward: the claimant must establish the existence of an enrichment on the part of the defendant that correlates with an impoverishment on his own part and is not condoned by the legal order, in the sense that it must lack a legal basis (a "justification", formerly called a "cause", i.e. a reason for the retention of the benefit). Furthermore, even though French law would not use this terminology, the law recognises three "defences" to liability, two full and a partial one:

(i) the fact that the claimant acted for his own benefit;
(ii) good-faith change of position (hidden within the provision on measure of recovery);[41]
(iii) claimant's fault – an open-textured concept which allows courts to apportion liability in a way that they consider, in English parlance, "fair and equitable".

Finally, the "subsidiary" character of the claim means that the scope of liability in unjustified enrichment is also restricted by rules which are external to it.

(b) History

Little needs to be said in the present context about the history of the doctrine, on which abundant literature already exists.[42] By way of the briefest summary, the Roman action known as *actio de in rem verso* (lit. "the action concerning [what was] turned into the thing" [read, the patrimony of the defendant]), which originally concerned a narrow and specific case of indirect enrichment,[43] was pressed into service as the vehicle through which Pomponius' maxim that "no one should be enriched at the expense of another"[44] could be given legal effect. For most of its Roman-French history, the action only existed in the law books: it was part of learned law, *le droit savant*. Courts, however, resorted to various devices to grant remedies *para legem* in situations of unconscionable enrichment not covered by specific doctrines like *impenses* or the *condictio indebiti*. In particular, the 19th century was marked by an abnormal extension of the scope of *negotiorum gestio* to situations where the claimant had acted in his own interest rather than the defendant's, a doctrine broad enough to cover potentially any case of unjustifiable enrichment outside the *condictio indebiti*, but with no normative underpinning.

Meanwhile Zachariae von Lingenthal, and later Charles Aubry and Charles Rau, inferred on the basis of various codal provisions the existence, as a matter of post-1804 *positive* law, of a general action in "enrichment without legitimate cause".[45] For most of the 19th century, litigants attempting to rely on the *actio de in rem verso* in court would fail; but ultimately the Court of Cassation gave in and, in the celebrated *Boudier* case, recognised the existence, outside of the Code, of an enforceable "principle of equity" which "forbids being enriched to the detriment of another".[46] The later history of *enrichissement sans cause* in French law, until the 2016 codification, can be read as one of specifying the requirements of the action – in practice, whittling down the scope of

substantively as well (in the sense that they are regarded as arising from "the rules of nullity" themselves rather than undue payment or unjustified enrichment).

[41] *Post* Part F(3)(a).

[42] See e.g., in French, F Goré, *L'enrichissement aux dépens d'autrui* (Dalloz, Paris, 1949), 5-30; in English, JP Dawson, *Unjust Enrichment: A Comparative Analysis* (Brown & Co, Boston, 1951), 92-109. The most detailed account is in German: W Lang, *Der allgemeine Bereicherungsanspruch im französischen Recht vor und nach dem Code Civil* (PhD dissertation, Frankfurt, 1975).

[43] Zimmermann (*supra* n 9), 878ff.

[44] D.50.17.206: "*Iure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*" ("By the law of nature, it is fair that no-one be enriched by the detriment and injury of another").

[45] C Aubry and C Rau, *Cours de droit civil français*, vol. 6 (4th ed, Marchal & Billard, Paris, 1873), §578: "The action *de in rem verso*, of which the Civil Code only contains specific applications, must be allowed in a general manner, as the sanction of the rule of equity according to which it is not permissible to be enriched at the expense of another, whenever, the patrimony of a person being enriched without a legitimate cause to the detriment of that of another, the latter would not have at his disposal, in order to obtain what belongs to him or is owed to him, an action arising from a contract, a quasi-contract, a delict or a quasi-delict".

[46] *Boudier* (*supra* n 3): "deriving from the principle of equity that forbids being enriched at another's expense".

application of what was quickly recognised as an enormously disruptive, in its potential, new doctrine of private law.

(c) Relationship between the general action and undue payment

i) subsidiarity
By application of the principle of subsidiarity, which will be returned to below, whenever the facts relied upon by the claimant are sufficient to give rise to a claim in undue payment, the enriched party will not be allowed to by-pass this action and sue in unjustified enrichment instead:[47] *paiement de l'indu* always takes precedence, within its sphere of application, over *enrichissement injustifié* narrowly so called. However, it should be noted that French law does not follow German law in its strong exclusionary rule whereby, if A made a *Leistung* – of which undue "payment" would be a species – towards B, those facts normally suffice to exclude all other actions (from A against a third party, by a third party against B or between two third parties) on the basis of the same shift of wealth. In particular – and this is in fact one of its most striking features from a comparative perspective – French law is happy in principle with the idea that if the claimant has performed (e.g. under a contract) towards his counterparty, he might sue in unjustified enrichment a third party who has benefited from the performance even though he was not the recipient of it.[48]

ii) subsumption?
Behind this description of the law lies another question, which is whether there is any principled reason why there should be two actions dealing – if through slightly different rules – with the same issue of the reversal of a benefit that ought not to be retained. Why have one doctrine for one type of enrichments and another for the rest? This is all the more puzzling because the line drawn between the two does not appear to have any normative force. It is hard to resist the conclusion that it is a historical happenstance: because a (narrower) set of rules already existed – which itself owed much to the idiosyncrasies of Roman law – the general principle was made to work around it once it came into existence, instead of swallowing it as it logically should have.[49] It is true that the two sets of rules operate in ways which are not identical, and at times exhibit significant discrepancies: but this too seems to be a historical accident, brought about by the existence of two different "pegs" which were allowed to develop their own separate rationalities.

2. Conditions of liability

(a) Enrichment and correlative impoverishment

French law, both pre- and post-Reform, insists on an enrichment on the defendant's part and a correlative impoverishment on the claimant's.[50] This twin requirement can be disposed of quickly. French law subscribes to a very broad understanding of what counts as enrichment, encompassing any "benefit" (*avantage*) that can be valued in money, including the acquisition of a new right – real or personal – or an increase in the content of an existing right, expenses saved or a debt paid. In the same way it is accepted that impoverishment can take the most varied forms, provided again a monetary value can be put on them.[51] Besides, enrichment and impoverishment must be

[47] Given the rules of both liability and recovery applicable to both actions, it does not seem that there would ever be a situation where the latter would be more advantageous to the claimant anyway.
[48] *Post* Part D(2)(b).
[49] This is not to say that undue payment could not be retained as an identified subset of claims within the broader principle, along lines similar to the *Leistungskondiktion* in German law.
[50] Until the Reform, the accepted solution was that both impoverishment and enrichment should exist (and were to be valued) at the time when the action was brought. This point is returned to, along with the new position, in Part F.
[51] AM Romani, "Enrichissement sans cause", in *Répertoire de droit civil, Encyclopédie Dalloz* (2016), §§48-9, 88.

"correlated": this is the French version of what it means for the defendant's enrichment to have been "at the expense of" the claimant. In cases of direct enrichment the link will typically be straightforward, but much less so when the enrichment is indirect. Unsurprisingly perhaps, courts or scholars have not developed any mature theory about what constitutes a sufficient nexus. The action will be rejected if too much time elapsed, or too many intermediaries were involved, between the two events represented by the impoverishment and the enrichment.[52]

As is well-known, the requirement of impoverishment is not one that is shared by all legal systems; in particular neither English nor German law has it (although lingering doubts can be seen to surface, at intervals, in the former).[53] From a French perspective it is however regarded as entirely unproblematic and, despite the lessons of comparative law, no scholar appears to have doubted that it was self-evident. The one argument typically pressed into service is that, if he recovered more than his impoverishment, the claimant would end up being himself unjustly enriched at the expense of the defendant. The implications of this stance, in particular as to whether the law of unjustified enrichment really is a law of benefits that ought to be given up, as opposed to a law of unjust impoverishment in the absence of a wrong (or to use the terminology of *Boudier*, echoed in the common-law world by Stoljar, a law of unjust "sacrifice"), is not one that has received any attention.[54]

(b) Lack of legal ground and "absence of any other action"

Remarkably, the above condition is all that the Cour de cassation insisted on in its seminal 1892 decision: "it suffices [for the action *de in rem verso* to be allowed] that the claimant should allege, and offer to establish the existence of, a benefit which, by his own sacrifice or act, he conferred on the person against whom he is claiming".[55] That this is unconscionably broad should be obvious from a comparative perspective; unsurprisingly, French courts came up in the decades that followed with two main control devices (which already featured in Aubry and Rau's formulation)[56] to restrict the scope of the action. One, the "absence of cause" (*absence de cause*), will not be surprising to comparative lawyers: it is an instantiation of the general *sine causa* approach of the civilian tradition to the unjustifiability of the enrichment. The other, now referred to as "subsidiarity" (*subsidiarité*), is less straightforward, as can be seen from the fact that other legal systems appear to dispense with it altogether.

It helps to study these requirements together because, even though they are analytically separate, they were developed at the same time and to achieve the same purpose, namely, keep in check the massive potential for disruption inherent in the doctrine the Court of Cassation had carved out of "equitable principles". There is also much overlap between the two doctrines, to the point where it can be doubted whether subsidiarity plays any meaningful role and should be retained as a separate requirement.

i) "absence of cause"

In 1914 the Court of Cassation made it clear that the enrichment had to be "without legitimate cause",[57] an ingredient of liability that has been retained unflaggingly ever since and will of course continue after the Reform, even though it will presumably now be known as the "absence of justification" to the enrichment. For some time there was uncertainty as to what this meant, in

[52] Romani (*supra* n 51), §122 and references cited.

[53] Most recently in *HMRC v ITC* [2017] UKSC 29 at [43] ("The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit", per Lord Reed).

[54] The point is alluded to in P Conte, "Faute de l'appauvri et cause de l'appauvrissement : réflexions hétérodoxes sur un aspect controversé de la théorie de l'enrichissement sans cause", 86 *Revue trimestrielle de droit civil* (1987), 223, 226.

[55] *Boudier* (*supra* n 3).

[56] *Post* n 45. They only appeared, however, in the fourth edition.

[57] Cass. Civ., 12 May 1914, [1918-19] S. I. 41, citing verbatim Aubry and Rau's formula (*post* n 45).

particular because the language of "cause" had already been pressed into service in the context of contract. It soon came to be accepted, however, that *cause* in *enrichissement sans cause* had a different – if in practice often overlapping – meaning from the cause-*contrepartie* (*quid pro quo*) of contract law, namely, the validation by the legal system of the shift of wealth: what Ripert and Tisseire called the "right to keep" the enrichment.[58] Accordingly the shift between the patrimonies is prima facie reversible – the "unjustified unless" approach of the civilian tradition – but this stops being the case if there is a rule in the legal order which, directly or indirectly, sanctions it. In English we would speak of there being a legal "basis" or "ground" for the enrichment.

What does legal basis mean in that context or, to put the same question differently, what legal grounds do there exist to the retention of an enrichment? New Art. 1303-1 CC states that "[a]n enrichment is unjustified where it stems neither from the fulfilment of an obligation by the person impoverished nor from his intention to confer a gratuitous benefit". But this is evidently too narrow: it might be a sufficient condition but certainly not a necessary one. Any time a shift of wealth is actively brought about, or passively ratified, by the legal order – whether through a manifestation of will of the parties or not – the enrichment will not be unjustified and can be retained. If, for example, a party is subrogated to the rights of another; or ownership is acquired through the rules of *occupatio*, *specificatio*, *accessio*, etc, no action in unjustified enrichment will lie: one party is incontrovertibly enriched at the expense of the other but not in violation of the provisions of the legal order, hence "justifiably".[59]

Although the "cause" of the enrichment can be any juridical act (an expression of will intended to have legal consequences) – e.g. a contract, a will, a judgement – or indeed, as mentioned, any provision of the law that is not mediated through a juridical act between the parties, in practice much of the discussion focuses on contracts: the most common reason why an action will be refused is because of the existence of a valid contract which sanctions the enrichment. Here, it must be pointed out that what French law insists on, consonant with the name of the doctrine, is that the *enrichment* should be unjustified. The impoverishment need not be.[60] In situations where the legal basis under which the shift of wealth took place is a contract between the parties, the legal ground for the enrichment will, by construction (and at least initially), also be that for the other party's impoverishment. But in situations of indirect enrichment this will not be so. In such cases French law has no difficulty with the view that the defendant's enrichment can be justified by a contract concluded with a third party. A common scenario is where C transfers a benefit to T pursuant to a contract. D, who is not party to the deal with C, benefits indirectly from the contract. Because T cannot, or cannot conveniently, be sued, C turns his attention to D and claims against him in unjustified enrichment. While there are a number of hurdles on his way to recovery (including the doctrine of subsidiarity and the existence of a legal ground justifying the enrichment as between T and D), French law is – contrary to most legal systems – happy in principle to entertain such claims. The fact that B's impoverishment is justified is irrelevant.

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[58] G Ripert and R Teisseire, "Essai d'une théorie de l'enrichissement sans cause en droit civil français", 3 *Revue trimestrielle de droit civil* (1904) 727, 791.

[59] One point that does not appear to have been noticed by French scholars is that there exists an ambiguity concerning the nature of legal bases. Sometimes they refer to an objective bond, such as contract or judgement; other times, to the subjective disposition of the claimant (e.g. *animus donandi*). These operate on two different levels. Most times they will be the flipside one of the other: when I pay to discharge my contractual debt, I normally – freely – intend (subjectively) to extinguish the bond by which I am (objectively) tied. But at times the tension will surface, as in the case of payment of another's debt under duress, where there does exist an obligation but no unvitiated intention to discharge it. This raises an intriguing question: when I freely pay to discharge my contractual debt, is the "just factor" the contractual obligation itself or rather my free intention to pay the debt?

[60] A strand of juridical writing does admittedly insist on there being a "cause" to the impoverishment, and the idea can be seen to surface in case law as well; but Philippe Conte has convincingly argued that this is wrong, using the word *cause* in a different sense and really being concerned with considerations of fault and risk-taking (see *post* Part D(2)(c)): Conte (*supra* n 54), 232ff.

ii) subsidiarity

Very difficult to disentangle in practice, if in principle entirely distinct, is the doctrine known as the "subsidiarity" of unjustified enrichment according to which (to quote Aubry and Rau's formula which the Court of Cassation made its own) the claimant should not already "have at his disposal … an action arising from a contract, a quasi-contract, a delict or a quasi-delict" if he is to be allowed to sue in unjustified enrichment.[61] The rule is difficult both to understand and, even more so, to justify. It is not clear what it means; to what extent courts give effect to it; or indeed whether, when properly understood, there is any room for it in the modern law.

The doctrine requires that there should be no other action – sometimes described by scholars as *de droit commun*, "at common law", as if the (equitable?) *actio de in rem verso* were an extraordinary remedy –[62] open to the claimant "in order to obtain what belongs to him or is owed to him".[63] Whatever exactly the latter point refers to, it is at least certain that it is not the same as "any action against the defendant". Thus, to use an example where the doctrine of subsidiarity has been invoked, the claimant who seeks to have the other party disgorge the profit made pursuant to a wrong is not claiming the same thing as delictual damages for loss caused by the wrong in question: accordingly, subsidiarity has no application here. It must be, in substance if not form, the same remedy that is being thought.

Of course, for the doctrine to step in, there should be an *unjustified* enrichment in the first place. This requirement, plain though it might be, disposes of a considerable number of claims examined by legal scholars under the heading of "subsidiarity". Thus, if a claimant can bring a *rei vindicatio*, by definition ownership has not passed and the defendant is not enriched by the value of the thing: no consideration of subsidiarity can even get off the ground. Again, and more significantly, whenever the benefit was transferred pursuant to a valid contract, the enrichment will not be unjustified and, here too, no consideration of subsidiarity arises in the first place. Accordingly, it is absurd to say that the reason why the victim of a bad deal cannot sidestep the contract and sue in unjustified enrichment for the fact that the other party was enriched at his expense is because he has a contractual action which takes precedence (and denies him a remedy): it is because the enrichment of the other party is in principle condoned by the legal order. It is justified. In all these cases there is no "competition" between the *actio de in rem verso* and another action because the former has not even prima facie arisen on the facts.

When a genuine overlap exists, the claimant would ordinarily want to give priority to the non-enrichment action anyway because the "double ceiling" of *de in rem verso* makes it a comparatively unattractive option.[64] The main difficulty concerns situations where the "priority" (i.e. non-enrichment) action is barred on the facts, for instance because of limitation periods. Let us assume that D committed a wrong towards C and C failed to sue in time. In such circumstances French law accepts without difficulty that C is impoverished (by the amount of damages he was entitled to) and D enriched by the same measure; but it is clear that C cannot – and rightly so – elect to sue D on the basis of unjustified enrichment, taking advantage of a longer limitation period. Is that, however, because the action in unjustified enrichment is "subsidiary" to that in delict which should be turned to, despite its failing in the particular instance, insofar as it provides the normal avenue to recover those damages (even if, by construction, they are not claimed *qua* delictual damages)? This might be the usual answer, but there are in fact two other, and well-grounded,

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[61] *Post* n 45, cited again verbatim by Court of Cassation in its judgement of 12 May 1914 (*post* n 57).

[62] While it is difficult to justify in any principled way that the post-1892 judge-made remedy was, once it had come into existence, of a different nature from all other private-law doctrines, it is impossible to deny that its extra-ordinary (sometimes rephrased as extra-codal) character has been a key undercurrent of legal analysis in respect of the *actio de in rem verso*, used to justify the subservient role to which it has been consigned. In that sense at least, its being put on a statutory basis in the Reform is extremely significant: it will no longer be possible to rely on the argument – or perhaps the unarticulated, yet very real, sense – that it is somehow subordinate to other sources of obligations.

[63] This too is from Aubry and Rau (*ante* n 45).

[64] *Post* Part F(3)(a).

bases which could justify the same outcome without resorting to the additional, *ad hoc*, doctrine of subsidiarity.

One would simply be to say that unjustified enrichment, like indeed any other principle of liability, cannot be used to stultify mandatory rules of law.[65] When it is the clear purpose of an established rule that the defendant should be able to retain the benefit claimed by the other party, no action in unjustified enrichment will be entertained: as Lionel Smith puts it, "the law of unjustified enrichment is not supposed to contradict the effect of other legal institutions … [It] must yield to the positive dispositions and also to the negative implications of those other legal institutions".[66] It is for the same reason that, for instance, a party cannot normally sue in delict when a risk that was excluded by a contract, with the approval of the law, materialises through the other party's negligence: this does not make delict "subsidiary" to contract; it simply prevents one party from, in Nicholas' words, "subvert[ing] an existing rule of law directed to the matter in issue".[67] In that sense, the anti-stultification principle – a "meta-rule" of law, i.e. one that deals with the relationship between two or more rules which are prima facie applicable – might be no more than an outworking of the principle that *specialia generalibus derogant*: the reason why the specific rule prevails over the general one is because we can safely assume that it was intended to apply in derogation of the broader doctrine (failing which it would lose its reason for being). The other basis, which is not entirely distinct from the first, would be to say that the enrichment allegedly caught by the subsidiarity rule was in fact – indirectly – justified, meaning again that no question of its being reversible ever arose: by terminating the action in delict, the legal order decreed that the defendant could now retain the benefit: a decision that, again, would be stultified – literally, made a fool of – if it could be claimed through a different route.

When all instances where it has been invoked have been considered, it seems that there only exists one – very specific – actual application of the doctrine of subsidiarity. It refers to the case of a third party receiving a benefit under a contract to which, by construction, he is not a party. If (but *only* if) his counterparty is insolvent, French law allows, subject naturally to all other requirements of liability being met, the party who has provided the benefit to leapfrog his contractual counterparty and sue the third party to the extent of his enrichment. Only if one action (the one in contract against the direct enrichee) is unavailable is the claimant allowed to use that in unjustified enrichment to recover against a remote enrichee: this rule can properly be described as working out a relationship of subsidiarity – i.e. support, reserve –[68] between the actions. Unsurprisingly this rule is regarded as highly controversial, since it amounts to making third parties at least partial guarantors of contractual debts and therefore undermines – indeed, stultifies – the allocation of risks that the contract had operated between the parties.[69] It is hard to resist the view that it should be abolished; to the extent that it remains, however, it should be given a different, and much more specific, name. Outside of it, the doctrine known as subsidiarity should be recognised as having no independent existence and be removed from the law's toolbox.

(c) Risk-taking, personal interest and fault

Beyond the above, sometimes referred to as, respectively, the "material" and "juridical elements" of the action in unjustified enrichment, a further set of rules – which did not feature in Aubry and Rau's formula or earlier case-law – was gradually developed by courts, namely, the twin principles

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[65] Rather than stultification, French scholars would rather speak of "fraud of the law" (*fraus legis*).
[66] Smith (*supra* n 21), 613.
[67] B Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law", 36 *Tulane Law Review* (1962), 605, 634.
[68] OED, q.v. "subsidiary".
[69] German law would bar an action on the basis of the exclusionary halo surrounding the *Leistungskondiktion* and English law because "it would undermine the contractual arrangements between the parties" (*MacDonald v Costello* [2011] EWCA Civ 930; [2012] QB 244 at [23]). A better solution is probably to have a robust view of the justification of the enrichment: for instance, in the absence of contract, a liberal intention as between the counterparty and the third party suffices to justify the latter's receipt of a benefit vis-à-vis the claimant.

that the claimant must not have acted "at his own risk" (*à ses risques et périls*) or "in his own interest" (*dans son intérêt personnel*), and that he should not have been at fault. However nothing was ever clear with these requirements, known as the "moral elements" of enrichment claims: whether they really existed; how they related to one another (indeed whether the former was a single doctrine or two different, albeit related, ones); what their rationales were; and what effect they had. Again, because of the obvious overlap, they are best taken together.

The recent codification now provides us with the stable starting point of a statutory provision, where the first two requirements have been combined and brought together with the third in a single article:

> Art. 1303-2. Compensation is excluded where the impoverishment stems from an act effected by the impoverished person with a view to personal profit.
>
> Compensation may be reduced by the court if the impoverishment stems from the fault of the person impoverished.

We will examine them in reverse order.

i) fault

Following a period of hesitancy, where courts oscillated between making fault irrelevant, barring the claimant's action in case of serious fault only, and making all *fautes* a bar to the action,[70] the role of fault in unjustified enrichment has now been aligned with that in restitution of undue payments. Accordingly what was said about fault earlier remains relevant. Here too, the shift from a counter-claim in civil liability – for an ill-identified loss – rolled up with the claim in enrichment without ground, to a "balance of equities" focusing, not on the consequences of the claimant's act, but on the conduct itself (and allowing courts to fine-tune the scope of the defendant's liability), only solves one problem by creating a greater one. Here too, the transparent aim of the doctrine is to protect good-faith reliance on the security of receipts: a commendable objective, but one that should be pursued directly rather than in this indirect, and highly inefficient, manner. And here too, fault has never been defined.

Until 2016 most examples would have concerned the provision of services in the (negligently) mistaken belief that performance was owed to the defendant, but this will now be dealt with as part of recovery of undue payment. The underlying issue here – which remains after the change – is how to valuate (and determine the scope of liability for the receipt of) a benefit that was never bargained for and cannot be returned in kind, to the effect that the defendant might be left – in a concrete sense at least – worse off after having to pay the value of the service than he was before receiving it. While French law never developed a clear set of principles in respect of the restitution of services, either as part of *enrichissement sans cause* or restitutions after avoidance of contract, the dominant view is clearly that what matters is the objective value of the service at the time it was originally received.[71] This is extremely favourable to the claimant, denying both what English law calls "subjective devaluation" and the idea that so-called "pure services" do not represent, at least in principle, an enrichment. Of course, if the service was deliberately imposed on the defendant in the hope of being paid despite the lack of agreement, the claimant will be regarded as having acted "with a view to personal profit" and will be denied recovery;[72] but if it was conferred in the mistaken belief that it was owed then, in principle, the claimant will be entitled to recover the full objective (market) value, regardless of whether the defendant needed or wanted it. This is a striking result, most probably wrong as a matter of principle. Here the fault principle,

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[70] The Catala project would have barred the claimant's action in case of serious fault (*faute grave*) only.

[71] Deshayes, Genicon and Laithier (*supra* n 33), 826; D Verse, "Improvements and Enrichment: A Comparative Analysis", [1998] *RLR* 85, 87-8; J Ghestin, G Loiseau and YM Serinet, *La formation du contrat*, vol. 2: *L'objet et la cause – Les nullités* (4th ed, LGDJ, Paris, 2013), §2920. The latter point is now made clear by Art 1352-8 CC. This is independent (when applicable) of any price put on it by a contract that was later avoided.

[72] See section immediately below.

with its apportionment of liability, will allow courts to mitigate any undue hardship which it might cause; and it is difficult not to suspect that the provision will be used even when the claimant made a reasonable mistake.[73]

As previously explained, the requirement of fault – or lack thereof – should be done away with, and replaced with doctrines which address the various underlying issues, rather than defuse them by allowing judges to do (what they perceive to be) justice on the facts of the case: doctrines concerning change of position, the valuation of services (generalising the principles already underpinning rules such as Art. 555 CC), illegality, etc.

ii) self-seeking conduct and incidental benefits

The claimant will also not be able to claim if he acted "with a view to personal profit" (Art. 1303-2 CC), the new formulation of acting "at his own risk" or "in his own interest". Even though it is broader (as the above example shows), this provision covers mainly what English law would call "incidental benefits" received by others. Neither system has worked out convincingly why these should be excluded, even though we all intuit that they should. Perhaps it is simply an application of the principle that *volenti not fit iniuria*: the person who freely consents to parting with the benefit without reciprocation, not believing that he is obliged to, cannot complain that he finds himself impoverished. In French law, it has been argued (as indeed in the case of *faute*) that self-seeking conduct barred the action because it was the "cause" of the impoverishment. But this is wrong on at least two counts: first, it does not matter according to principle whether the impoverishment is caused or not; secondly, it uses the word *cause* in a very different sense from the ordinary one of legal ground. What it says is that the parting away with the benefit has a factual explanation for why it happened: but in that sense, of course, *all* impoverishments have a cause.

(d) Lack of legal basis, unjust factors and French law

Where does this leave French law in respect of the comparative debate concerning the role of legal grounds and unjust factors in the reversibility of enrichments? As is well known, it has become increasingly accepted over the last decades that the crude opposition traditionally drawn between the "unjust factors" approach of the common law – which assumes that a shift of wealth should, by default, stand and looks for reasons to reverse the enrichment – and the *sine causa* approach of the civilian tradition – which will not condone the swelling of one party's assets at the expense of the other unless it can point to a positive reason for its retention – is a false dichotomy. Perhaps inevitably, all legal systems do rely both on reasons for restitution and reasons for retention.[74] This is true of French law too.

It is often assumed that French law, as indeed the very name of its general enrichment principle (*enrichissement sans cause*, *enrichissement injustifié*) would seem to give away, is firmly in the *sine causa* camp of the civilian tradition. In one sense, of course, this is true: the claim in unjustified enrichment expressly relies on legal bases for the retention of the benefit, making no explicit use of any English-style unjust factors. But the observation must be seriously nuanced on at least two counts. The first is that, as pointed out several times, the heart of the law of unjustified enrichment is occupied by the doctrine of recovery of undue transfers where, as was seen, liability revolves – explicitly or implicitly – around the unjust factors of mistake and duress. Rightly understood, i.e. as a mechanism to restore benefits transferred because the claimant believed he was obliged to pay an obligation which did not in fact exist, error is inherent to the claimant's cause of action, which

[73] Beyond negligence in being mistaken about the "owing-ness" of a service, fault has also been found in situations where it was wrongful of the claimant to confer the benefit in the first place: an example being the case of a farmer who continued to occupy land after he had been ordered by a court to leave, and improved it thereafter (Cass. Soc., 18 March 1854, JCP 1954. II. 8169).

[74] See, in particular, L Smith, "Demystifying Juristic Reasons" 45 *Canadian Business Law Journal* (2007), 281, 304: "I have suggested that every legal system can and does mix the two approaches".

is the very reason why it does not have to be specifically pleaded. Still within recovery of undue payment (even though, as was explained, it should properly be part of the general enrichment action, precisely because there was no mistake), duress is a ground for recovery when the claimant knowingly paid another's debt.[75]

As to *enrichissement injustifié* narrowly so called, the requirement of Art. 1303-2 al. 1 overlaps to a significant extent with absence of mistake or duress: he who acted "with a view to personal profit" knew that he was under no obligation to benefit the other party and nonetheless acted freely to confer the benefit on him. This so-called "moral element" set out by French law plays a role which, in English law, would be devoted to unjust factors: the fact that its presence is indispensable to avoid overreach suggests that the role of reasons to return a benefit can never be eradicated, even in systems which do not make any room for it on the surface.

E. FRENCH ENRICHMENT LAW AND THE WILBURG/VON CAEMMERER TAXONOMY

Given its predominance in comparative scholarship it is interesting to map at least briefly the above developments onto the Wilburg/von Caemmerer taxonomy, originally devised in the context of Austrian and German scholarship but which, it is often argued, provides a universal map to the law of unjustified enrichment.[76]

This map of enrichment law first divides (following §812 BGB) unjustified enrichment between enrichment by performance (*Leistung*) and enrichment in "any other way", then the latter – in a non-exhaustive way – between : (i) interference with the claimant's right, corresponding (in an imperfect way) to what English law calls "restitution for wrongs"; (ii) unauthorized expenditure on the defendant's property; and (iii) discharge of an obligation owed by the defendant.[77]

1. *Leistungskondiktion*

The division between *Leistungskondiktion* and *Nichtleistungskondiktionen* immediately echoes that between the recovery of undue payment and (residual) unjustified enrichment in French law. Whilst the similarities are very real, there are several important differences between the two systems:

(i) The principal difference is that the concepts of *Leistung* and *paiement*, while overlapping considerably and undoubtedly centring on the same core, have different scopes. For the most part, recovery of undue payment is narrower than the *Leistungskondiktion*. A *paiement* is only one type of *Leistung*; it is restricted to performances done with the specific purpose of extinguishing an obligation (*solvendi causa*) and, until 2016, excluded the provision of services. The German doctrine, on the other hand, extends to performances underpinned by other purposes (or *causae*), in particular what Roman law would have included under the *condictio causa data causa non secuta* (which under French law would go to the general enrichment claim).

However, *paiement de l'indu* is wider in at least one respect, which is that it includes cases of mistaken payment of another's debt which, in the Wilburg/von Caemmerer taxonomy, would pertain to the *Rückgriffs*-, not the *Leistungskondiktion*. If A pays B's debt to C believing it to be its own, under French law A can recover from C in undue payment. It does not matter that there

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[75] *Ante* Part C(2)(a).

[76] W Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (Leuschner & Lubensky, Graz, 1934); E von Caemmerer, "Bereicherung und unerlaubte Handlung" in Hans Dölle *et al.* (eds), *Festschrift für Ernst Rabel*, vol. 1 (Mohr, Tübingen, 1954), 333.

[77] Not all instances of unjustified enrichment recognised in French law would map onto this taxonomy, in particular cases of enrichment *ex alieno contractu*, which represent an area of the law where French law is more open than German (or English) law, allowing in principle leapfrogging in cases where the direct enrichee is insolvent and the gain of the indirect enrichee is not justified by a legal ground between himself and the immediate enrichee.

exists a legal basis to C's enrichment, namely, B's debt (which in German law would bar the *Leistungskondiktion*): all that matters for the purpose of the action is that A sought to extinguish a debt – his own – which did not exist.

(ii) A second structural difference is that, under the Wilburg/von Caemmerer taxonomy, enrichment by performance is regarded as a constituent part (indeed the main one) of unjustified enrichment whereas, as was seen, a paradox of French law is that the equally central doctrine of restitution of undue payments falls outside the boundaries of the general action. As was just seen, this is not merely presentational and has substantive consequences.

(iii) Finally, French law does not subscribe to the strong exclusionary effect of the *Leistungskondiktion* according to which the existence of a *Leistung* between A and B normally excludes any non-*Leistung*-based actions (whoever the parties might be) based on the enrichment provided by the *Leistung*. There is no such "halo" of undue payment on residual unjustified enrichment in French law.

2. *Eingriffskondiktion*

Enrichment by wrongdoing poses difficulty to French law, whether it be regarded – like the *Eingriffskondiktion* in Germany – as part of the law of unjustified enrichment or – as is the dominant view in England – the law of civil wrongs. If the former, the requirement of impoverishment excludes in principle all cases where the benefit accrued from a third party and disgorgement (giving "up" rather than giving "back") is sought; if the latter, the restriction of monetary damages to compensatory damages, as orthodoxy continues to have it, excludes the award of gain-based, as opposed to loss-based, damages.

Yet, it would be incorrect to say that there is no such thing as restitution for wrongs in French law. Both bodies of law do in fact accommodate such situations, albeit in no principled way. On the side of the law of delict (*responsabilité extra-contractuelle*), it has long been the case that courts might regard the defendant's benefit as the flipside of the claimant's loss. This allows them to grant what is effectively disgorgement of profits by deeming it – sometimes against all plausibility – to correspond to a loss wrongfully caused. More recently, the Law of 29 October 2007 on Anti-counterfeiting has made gain-based awards openly possible by providing that, in case of violations of specific intellectual property rights, the court should "take into account … profits made by the injuring party" when determining quantum of damages.[78]

On the side of unjustified enrichment, there also exists a number of cases where courts have granted an indemnity, based on what English lawyers would call a reasonable licence fee, to claimants whose property had been used without permission. These would be difficult to square with principle because the fee would only correspond to the claimant's loss and the defendant's gain if they had been prepared to negotiate, which ordinarily will be speculative at best; yet their existence cannot be denied. More importantly, the new provision in Art. 1303-4 CC, which swaps around the basis of recovery in case of bad-faith enrichees, would seem to open the door to a fully fledged principle of disgorgement of profits when the defendant received a benefit which he knew he was not entitled to keep.[79] It is however unclear whether this was even contemplated by the draftsmen, and little can be said about this provision with confidence until courts begin to interpret and apply it.

[78] Code de la propriété intellectuelle, Art. L331-1-3; and see generally M Séjean, "The Disgorgement of Illicit Profits in French Law", in E Hondius and A Janssen (eds), *Disgorgement of Profits: Gain-Based Remedies Throughout the World* (Springer, Cham, 2015), 121.

[79] *Post* Part F(3)(b).

3. *Verwendungskondiktion*

Imposed enrichment, as common lawyers would say, is dealt with through several doctrines in French law, but not the general action for unjustified enrichment. The most common types of situations are dealt with by specific provisions of the Code pertaining to property law, the law of succession or matrimonial regimes: thus Art. 555 deals with expenses incurred by the defendant when making "plantings, constructions and works" with his own materials on the claimant's land; Art. 599 al. 2 with usufructuraries who returns a thing improved when their right expires; Art. 861 with donees who have to return gifts; Art. 1469 with former spouses who divide the matrimonial property, etc. These provisions sometimes allow restitution of an imposed enrichment; the details of the rules are complex and do not belong here.

Besides these lies the *actio negotiorum gestorum*. This institution normally requires the claimant to have acted with an altruistic purpose (i.e. for the benefit of the defendant, but short of liberal intent); however French courts have long known and used a form of analogous action known as "anomalous *negotiorum gestio*" (*gestion d'affaire anormale*), allowing recovery in situations where the gestor acted for his own benefit – for instance a genealogist who finds out that someone is entitled to an inheritance and, having revealed the fact to the stranger, seeks remuneration for his work. This was a vehicle used by French courts to grant remedies for what was in effect unjustified enrichment long before the *Boudier* case. It is ordinarily believed to have been laid to rest following the recognition of the new action, but Philippe Remy has shown that it was not, and has continued to be pressed into service by courts in an *ad hoc* fashion to deal with situations coming under the *Verwendungskondiktion*.[80]

Apart from these, it is unlikely that any claim would lie under the general enrichment action. Unless the claimant believed himself to be obliged to act in the way which enriched the claimant – in which case this would be a *Leistungs*-, not *Verwendungskondiktion*, he most likely acted in his own interest and any action would accordingly be barred by the operation of Art. 1303-2.

4. *Rückgriffskondiktion*

Finally, payment of another's debt comes within the purview of recovery of undue payment, if perhaps an overly extensive understanding of the doctrine.[81] Of course, in French as in German law, subrogation (*subrogation personnelle*) and *negotiorum gestio* might also be used to obtain recovery when the payment was not intended as a liberality towards the real debtor.

F. THE MEASURE OF RECOVERY

1. Introduction

(a) Generalities

We turn to finish to the measure of restitutionary recovery. More than other legal systems, French law draws a sharp distinction (inherited from the Roman division between the *condictio indebiti* and the *condictio furtiva*) between good-faith and bad-faith recipients, which the Ordonnance has now extended from undue payment to unjustified enrichment. In this context, bad faith means the

[80] P Remy, "Les restitutions dans un système de quasi-contrats : l'expérience française", in L Vacca (ed), *Arricchimento ingiustificato e ripetizione dell'indebito* (Giappichelli, Turin, 2005), 73, 94). The same scenario has given rise to successful actions in unjustified enrichment: see Goré (*supra* n 42), 127. The *actio negotiorum gestorum utilis* must be abolished from judicial practice: not only does it properly belong in the general action for unjustified enrichment; it has no normative underpinning given that it does not share the requirement which is at the core of – and gives validity to – what is already a controversial doctrine.

[81] *Ante* Part C(2)(a).

knowledge that one was not entitled to receive (or is not entitled to retain) the benefit received; good faith – which is presumed – simply being the absence of such knowledge.

The obligation that lies on the defendant found liable under the former doctrine is described as one of "restitution" (*restitution*, formerly called *répétition* i.e. "demand back", return, recovery). The content of this obligation is dealt with as part of a new chapter in the Code headed "restitutions" (Arts 1352 – 1352-9 CC). The scope of this chapter is intriguing, dealing as it does with situations as varied as restitutions under failed contracts and the (proprietary) *rei vindicatio*; but not – remarkably – unjustified enrichment, which has its own set of provisions within the chapter on "other sources of obligations". Remarkably the obligation to give up a benefit under the claim in unjustified enrichment is referred to as one of *indemnisation* (indemnification, compensation) not "restitution",[82] even though the latter word is also used in this context. The coexistence of two different sets of rules and terminologies is significant, if only insofar as it suggests that the two doctrines might in fact be underpinned by different principles, at least in part.

(b) The primacy of restitution in kind.

The first point to mention is that French law – like German law – holds strongly to the principle of primacy of restitution in kind. It is the very thing that was transferred, or shifted, without a "legitimate cause" which must be restored, returned, repeated, restituted (or, in the case of fungibles, the same quantity of the same quality). Only if this is impossible does the obligation morph into one of returning its value. This will seem surprising from an English perspective, but is in fact part of a broader paradigm within the French law of obligations whereby, at least in principle, remedies in kind take precedence:[83] not simply *restitution en nature* of unjustified enrichment but also specific performance of contractual obligations and even *réparation en nature* in the law of delict.

Of course this principle assumes that restoration in kind is not simply practically possible in the instant case, but meaningful in the first place. Accordingly it excludes services, which are inherently incapable of being restituted in kind, and also, through the provision of Art. 1352, money. On the other hand it applies not only to things capable of being vindicated but also to *choses de genre* (unascertained movable property): to put the same point differently, restitution in kind need not be *in specie* (i.e. the specific thing itself); it can be *in genere* (a thing of the same type).

The rule applies both to undue payment and unjustified enrichment; and restitution in kind can not only be demanded – within its scope of application – by the claimant but, it seems, also imposed on him, even if he has no interest in recovering the thing itself. Importantly, the primacy of restitution in kind applies not simply to things which are being vindicated but also to those which are "condicted": the defendant who has acquired ownership will be required to transfer it back, along with possession, to the successful claimant.

(c) Three paradigms

In order to understand their underlying logic, it is helpful to map the details of recovery under undue payment and unjustified enrichment against three distinct (albeit overlapping) models of liability.

The first paradigm is one of *unjustified enrichment*: as the name suggests, the aim here is to make the defendant give up to the claimant a gain that is connected to him and which the defendant ought not to be retaining. The focus in this model is on the defendant's enrichment.

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[82] Cf Marie Malaurie, *Les restitutions en droit civil* (Cujas, Paris, 1991), 50 who distinguishes the *actio de in rem verso* from restitution, the former being conceived of as a loss-based action (where, unlike tort, the claimant might receive less than his loss because the defendant was not at fault).

[83] In the field of the *condictio indebiti*, Roman law simply asserted that "recovery is either of what is actually given or its value in money" ["*aut ipsum aut tantundem repetitur*"] (D.12.6.7 [Pomponius, *Sabinus*, book 9; tr. Pennsylvania Digest]).

While the time at which this is assessed is not dictated by analytical necessity, it is more logical to look at the enrichment that exists at the time of litispendence (or judgement or even, conceivably, execution of the judgement): this is in the nature of a claim that asserts, at the time it is brought, "give up to me what you should not be having *in bonis*!"[84]

The second paradigm is that of *unjustified impoverishment*. This is the flipside of the above and looks to the claimant's loss insofar as it is regarded by the law as sufficiently connected with the defendant ("make up to me what I should still be having!"). Here too, we will be interested at least prima facie in the surviving impoverishment. While this paradigm seems much less intuitive than the previous one in a field described as "unjustified enrichment", the very fact that the ordinary measure of recovery under *enrichissement sans cause* has always been, in French law, the lesser of the defendant's enrichment and the claimant's impoverishment (the so-called rule of *double plafond* i.e. "double ceiling") suggests that it has, as a starting point, equal significance in terms of the measure of recovery.

Finally, the third paradigm is that of *restitution*, in the etymological sense of "the action of restoring or giving back something to its proper owner".[85] In core cases, namely corporeal things which are not perishable and can be restituted in the same condition as they were received, the model will both be self-explanatory and clearly distinguished from the other two: "give back to me what you unduly received from me!". Accordingly, if the thing is later depleted, damaged, destroyed, lost, etc., under the enrichment paradigm the defendant will only have to return – in kind or value – what is still in his hands, whereas on the restitution paradigm he would still be obliged to return the thing itself – or indeed its value if this has become impossible.

However the line between the two will often be blurred because the sheer passing of time is enough to transform the thing transferred: it will grow, wither, produce fruits etc. Here the basic principle (which can be difficult to apply in practice, especially when it comes to fruits) should be that the restitutionary model demands the return of whatever the claimant would have in his hands at the time the claim is brought if the thing had never been transferred to the other party. Thus it includes fruits which would have accrued in any event (and not been consumed); but it excludes all the benefits (natural fruits, legal fruits, improvements) as well as detriments ("degradations or deteriorations", as Art. 1352-1 CC puts them) which are attributable to the defendant. If he is required to restore either more or less than that, this constitutes a departure from the restitutionary paradigm.

2. Recovery of undue payments

(a) Good-faith recipients

The measure of recovery under undue payment can give rise to some difficulties, but the general principles (leaving aside the moderating power of courts in case of fault, mentioned above) are straightforward enough.[86] When it comes to the paradigmatic case of the receipt of a specific (non-fungible) thing, a good-faith recipient: (i) must return the thing itself or its value at the date of restitution;[87] (ii) is not liable for the diminution in value caused by any "degradations or deterioriations" to the thing, unless these were "due to his fault";[88] (iii) must only account for the

[84] The terminology of "surviving enrichment" is well established, but it falsely suggests that this will be inferior to "enrichment received", whereas the defendant might in reality have made consequential gains.
[85] OED, v° "restitution".
[86] For the valuation of services, newly brought within the scope of the doctrine when supplied *solvendi causa*, see *ante* Part D(2)(c).
[87] Art. 1352 CC.
[88] Art. 1352-1 CC. It is not clear what "being at fault" could mean in that context. There is no duty of care towards one's own property; and if a person (reasonably?) believed himself to be the owner of a thing, he commits no fault by leaving it to decay, destroying it etc. It seems that the only situation where a *faute* might be characterized is where the defendant knew, or ought to have known, that his receipt was unjustified and the thing would have to be returned.

price received if the thing was sold on;[89] (iv) is not liable for interest;[90] (v) is not liable for fruits taken;[91] (vi) is not liable for the value of enjoyment;[92] (vii) can – like the bad-faith recipient – be reimbursed the value of his necessary or useful expenses on the thing (subject to a moderating power of the court, and up to the increase in the thing's value).[93]

This represents a combination of all three paradigms above: by default, the defendant must return the thing itself which he received, including any benefit that would have accrued naturally (restitution model). If he retains less than he received – e.g. the thing was damaged, given away or sold for less than its worth – he is only liable for what he still has in his assets: the enrichment paradigm steps in (which also accounts for the recovery of expenses). Conversely, if he is left with more than he originally acquired – interest received, fruits gathered but not consumed, use enjoyed, profitable transaction with a third party entered into – he is not liable and must only return what the other party has parted with: impoverishment model. (As mentioned, however, money follows different rules which give effect to a pure restitutionary paradigm,[94] as do services.[95] It is in their respect that we see most clearly the consequences of restitution of undue payments not being a species of enrichment liability, a key feature of French law.)[96]

(b) Bad-faith recipients

In Roman law, the bad-faith recipient was regarded as a thief, which made him liable to the *condictio furtiva* (and also the *condictio indebiti*, even though his bad faith prevented ownership from passing). While French law no longer follows these rules, it still treats the bad-faith recipient of an undue payment more harshly. Accordingly, when it comes to immovables and ascertained movable property, besides (i) having to return the thing itself or its value at the date of restitution;[97] he (ii) is liable for the diminution in value caused by degradations or deteriorations;[98] (iii) must account for the entire value of the thing at the time of restitution, if he has sold it for a lesser sum;[99] (iv) is liable for interest;[100] (v) is liable for fruits taken;[101] (vi) is liable for the value of enjoyment;[102] (vii) can recover for his expenses in the same way as the good-faith recipient.[103]

This is the mirror image of the previous case. The default paradigm is still that of *restitutio*. But the unjust enrichment paradigm steps in when the defendant retains more than the benefit originally received or its value: he must now restitute the increase (interest, fruits, enjoyment value, benefit of sale). On the other hand, if the surviving enrichment is less than the benefit originally

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89 Art. 1352-2 al. 1 CC. Presumably, (i) by extension this would be zero if the thing was given away; (ii) by symmetry with the opposite situation, this is implicitly limited to situations where the price received is lower than the court-assessed objective value of the thing.

90 Art. 1352-7 CC. The article is unhelpfully phrased. It says that the good-faith defendant is liable for fruits from the point the claim is brought. But, at this point, the defendant is regarded as being in bad faith, knowing that he is not entitled to retain the benefit (of course he might dispute the claimant's assertion, but by construction we are in a situation where the latter has won, and *ignorantia iuris non excusat*). Accordingly the good-faith defendant is not liable for fruits at all.

91 Idem.

92 Idem.

93 Art. 1352-5 CC.

94 Art. 1352-6 CC. "[I]nterest at the rate set by legislation" represents the deemed growth of money over time.

95 Art. 1352-8 CC.

96 The lack of clear principles in case law makes it difficult to compare the post- with the pre-2016 law, but logically the shift of services carried out *solvendi causa* from unjustified enrichment to undue payments will have meant a change – favourable to the claimant – from one model of liability to another. This does not appear to have been discussed.

97 Art. 1352 CC.

98 Art. 1352-1 CC.

99 Art. 1352-2 al. 2 CC.

100 Art. 1352-7 CC.

101 Idem.

102 Idem.

103 Art. 1352-5 CC.

received (damage, unprofitable transaction with a third party), the unjust impoverishment model takes over and the claimant will receive the full value of what he has been deprived of, even if this is more than what the defendant retains. In other words, where the good-faith defendant gets the benefit of the model which favours him, this favour is granted to his adversary in the case of a bad-faith defendant. (Again, this does not apply to money and services, which are controlled entirely by the restitutionary paradigm).

3. Unjustified enrichment

The Ordonnance introduced a similar distinction between good- and bad-faith recipients in an area where it did not previously feature.

(a) Good-faith recipients

A good-faith recipient owes (subject again to the moderating power of the court if the claimant was at fault) an "indemnity" which is the lesser of the two sums represented by the claimant's original impoverishment and the defendant's surviving enrichment at the time the action is brought.[104] This is the well-known rule of *double plafond* ("double ceiling"), which represents a hybrid of the enrichment and impoverishment paradigms above. This rule, which is often regarded by English lawyers as repugnant to the very principles of the law of unjust enrichment – even though it has been adopted, under the influence of French and Quebec law, in Canada and has also been defended in an English context –[105] appears self-evident to French scholars: if it were not so, the claimant would receive an unjustified windfall at the defendant's expense.[106] The fact that enrichment is assessed at the time of litispendence means that a defence of change of position is built into the rule for good-faith defendants;[107] it also excludes claims for consequential gains, insofar as they will normally exceed the value of impoverishment.[108]

(b) Bad-faith recipients

As with undue payment, the law conserves the same paradigms when it comes to bad-faith recipients but reverses their order. The successful claimant is now entitled to the greater of the two sums (his original impoverishment or his bad-faith opponent's surviving enrichment), as valued at the time of judgment.[109] This is a new provision, which can be traced to the Terré project:[110] before the Reform, the bad-faith defendant was not treated differently from the good-faith recipient (which the defendant was presumed to be).

If the defendant has parted, voluntarily or not, with some of the enrichment, the practical effect of this provision is to deny him the benefit of the defence of change of position: he will be liable to pay the value of the claimant's loss, which in most cases corresponds to his own initial

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[104] Art. 1303 CC.

[105] M McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis Canada, Markham [Ont.], 2014), 184-5; A Trotter, "The Double Ceiling on Unjust Enrichment: Old Solutions for Old Problems", [2017] *CLJ* 1.

[106] As mentioned most recently in the official Rapport (*supra* n 5), q.v. "l'enrichissement injustifié".

[107] Again, the defendant on judicial notice that he might have to return the benefit is deemed in bad faith, hence is no longer able to rely on it after the beginning of judicial proceedings.

[108] A significant – if puzzling – development in the Reform is the move from nominalism to valorism in the assessment of claims: whatever the losing defendant must pay is the number of monetary units it takes at the time of judgment to transfer value equal to the indemnity calculated at an earlier date. This is puzzling not because valorism is wrong but because the choice between nominalism and valorism should be done in a much more general way. One direct consequence of this partial shift to another logic is that the impoverished claimant in unjustified enrichment is now treated more favourably than the manager of another's affairs, when the opposite had always been true on account of the latter's altruism (Deshayes, Laithier and Genicon (*supra* n 33), 560).

[109] Art. 1303-4.

[110] Terré (*supra* n 2), Art. 13.

enrichment. Indeed it is likely that this was the aim of the provision. The earlier Catala project (and the first draft of the Reform circulated by the Ministry of Justice in 2011) had instead addressed this point directly by changing the time of assessment of the enrichment, in case of bad faith, from litispendence to original receipt.[111] However the rule has another, perhaps unexpected, effect: where a defendant has made consequential gains, the operation of Art. 1303-4 CC will now force him to disgorge them to the claimant. This need not be a bad thing based on intuitions of common morality, but it is puzzling given the French consensus, noted above, that the law of unjustified enrichment should not result in a windfall for the claimant (and it does not fit the first principles of the law of delict either);[112] indeed it is not clear that this outcome was contemplated by the draftsmen at all.

G. CONCLUSION

Even though it is in many ways no more than a footnote to the Ordonnance of 2016, the recent Reform of French law which it brought about is the most significant makeover of the third pillar of its law of obligations since 1804. By putting the general (if residual) claim for unjustified enrichment on a statutory footing, it has turned an action which had never managed to throw off the shackles of its equitable, hence extra-ordinary, character into one that stands on a par with other principles of liability. One might hope that this will allow courts and scholars, which had been meandering between extremes, to determine the rightful scope of the claim. In any event, a principal merit of the Reform is to provide clarity in an area of the law that had long been plagued by uncertainty and conflicting strands of case law. Most of the substantial changes (to the extent that they are in fact changes rather than lines drawn for the first time) are also to be welcome, limited though they might be.

Yet, for the most part, disappointment is the dominant note: compared, in particular, with German law, French law remains massively underdeveloped and -conceptualised. New uncertainties have been introduced, for instance concerning disgorgement of profits; a transversal doctrine of reducing liability on the basis of an ill-defined idea of "fault" is in danger of swallowing the whole area under a destructive principle of remedial discretion; more generally a unique opportunity to eliminate the quasi-contractual category and, if not merge, at least think through the relationship between the general action in unjustified enrichment and the doctrine of undue payment, was missed. The emergence of a mature, sophisticated French law of enrichment without ground, capable of being a source of inspiration for other legal systems, remains a distant and uncertain prospect.

[111] Catala (*supra* n 2), Art. 1339. See also Civil Code of Quebec, Art. 1495 al. 2.

[112] The official Rapport (*supra* n 5) explains that the rule acts as a "sanction" against bad-faith defendants. How far this goes towards justifying either aspect of the rule is however an open question. Both the Catala and Terré projects had suggested to introduce disgorgement damages in the context of the law of extra-contractual liability, but this is not being taken forward in the reform of civil liability currently under consideration.